

## Emergency Regulation

830 CMR: DEPARTMENT OF REVENUE

830 CMR 63.00: **TAXATION OF CORPORATIONS**

830 CMR 63.00 is amended by adding the following section:

830 CMR 63.38R.1: *Massachusetts Historic Rehabilitation Tax Credit*

(1) *Statement of Purpose, Effective Date.*

(a) *Statement of Purpose.* 830 CMR 63.38R.1 explains the calculation of the historic rehabilitation tax credit established by M.G.L. c. 62, § 6J and M.G.L. c. 63, § 38R (St. 2003, c. 141, §§ 22, 24 and 82, as amended by St. 2004, c. 65, §§ 5-9, 13-18, 54). Under the statute, the Commissioner, in consultation with the Massachusetts Historical Commission, shall authorize annually, for the five year period beginning January 1, 2005 and ending December 31, 2009, under M.G.L. c. 62, § 6J together with M.G.L. c. 63, § 38R, an amount not to exceed \$10,000,000 per year in credits.

(b) *Outline of Topics.* 830 CMR 63.38R.1 is organized as follows:

- (1) Statement of Purpose; Outline of Topics, Effective Date
- (2) Definitions
- (3) Amount of Credit
- (4) Certification of Rehabilitation; Chosen Projects; Written Notice
- (5) Chosen Projects; Application of Criteria
- (6) Application Process and Administrative Fees
- (7) Transferability of Credit
- (8) Allotment of Credit Among Partners, Members or Owners
- (9) First Tax Year for Claiming Credit
- (10) Carryforward of Credit
- (11) Limitations on Credit; Ordering of Credit
- (12) Recapture
- (13) Authorization to Take Further Actions

(c) *Effective Date.* 830 CMR 63.38R.1 takes effect upon promulgation and applies to tax years beginning on or after January 1, 2005.

(2) *Definitions.* For purposes of 830 CMR 63.38R.1, the following terms shall have the following meanings, unless the context requires otherwise:

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*Certified rehabilitation*, the rehabilitation of a qualified historic structure that has been approved and certified by the Chairperson of the Massachusetts Historical Commission as being consistent with the standards established by the Secretary of the United States Department of the Interior for rehabilitation of historic properties.

*Chosen projects*, projects which have received second certification under 830 CMR 63.38R.1(4)(b).

*Code*, the Internal Revenue Code of 1986, as amended and in effect for the taxable year.

*Commission*, the Massachusetts Historical Commission.

*Commissioner*, the Commissioner of Revenue.

*Completed Projects*, chosen projects which have received final certification under 830 CMR 63.38R.1(4)(c) and which have been substantially rehabilitated and placed in service.

*Placed in service*, this term shall have the same meaning as the term is given under section 47 of the Code and any federal regulations thereunder.

*Project*, any building or structure, submitted by the taxpayer to the Commission for certification of rehabilitation.

*Qualified historic structure*, any building or structure, located within the Commonwealth that is individually listed on the National Register of Historic Places or is a contributing building within a district that is listed on the National Register of Historic Places or has been determined by the Massachusetts Historical Commission to be eligible for listing on the National Register of Historic Places, and which all or any portion of which is owned, in whole or in part, by the taxpayer.

*Qualified rehabilitation expenditure*, any amount properly chargeable to a capital account and described in section 47(c)(2)(A)(i) of the Code, as amended and in effect for the taxable year, incurred in connection with the certified rehabilitation of a qualified historic structure, but the term shall not include personal property, personal use property or the cost of acquiring any building or interest therein.

*Substantial rehabilitation* and *substantially rehabilitated*, the qualified rehabilitation expenditures of the building during the 24-month period selected by the taxpayer ending with or within the taxable year exceed 25 per cent of the taxpayer's adjusted basis in such building and its structural components as of the beginning of such period. In the case of any rehabilitation that may reasonably be expected to be completed in phases set forth in architectural plans and

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specifications completed before the rehabilitation begins, the applicable period referred to in this paragraph shall be 60 months.

*Taxpayer*, a corporation or other entity subject to an excise imposed by M.G.L. c. 63 and a person, firm, partnership, trust, estate, limited liability company or other entity subject to the income tax imposed by M.G.L. c. 62.

### (3) *Amount of Credit.*

(a) *Calculation of Credit.* The credit shall be equal to a percentage, not to exceed 20 per cent, of the qualified rehabilitation expenditures made by the taxpayer with respect to a qualified historic structure which has received final certification and has been placed in service as provided for in 830 CMR 63.38R.1(9).

(b) *Available Credit.* The Commission shall determine and account for the amount of credit available for allocation. The amount available in any given year shall be equal to the sum of 1) the annual authorized amount of \$10,000,000 for that year, 2) any recapture amounts, and 3) any credit amount previously allocated to a chosen project under 830 CMR 63.38R.1(3)(c), which was disallowed by the Commission upon final certification under 830 CMR 63.38R.1(4)(c). In no event shall the total amount of credits allocated during the five year period exceed \$50,000,000.

(c) *Allocation of Credit.* The Commission shall allocate the available credit among projects chosen to receive second certification. Each chosen project shall be allocated a percentage, not to exceed 20 per cent, of qualified rehabilitation expenditures as proposed and certified under 830 CMR 63.38R.1(4). The Commission shall apply the criteria set forth under 830 CMR 63.38R.1(5) and assess and prioritize each initially certified project within the deadlines set forth under 830 CMR 63.38R.1(6). After such assessment, the Commission may issue the second certification to one or more projects and allocate some or all of the available credit among such chosen projects.

### (4) *Certification of Rehabilitation*

(a) *Initial Certification.* An initial certification is the certification by the Commission that the structure meets the definition of a qualified historic structure.

(b) *Second Certification; Chosen Projects; Written Notice.* A second certification is issued by the Commission prior to construction, certifying that if completed as proposed, the rehabilitation work will meet the standards required for a

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certified rehabilitation. The Commission may issue a second certification during or after the construction process.

1. Projects which receive second certification are chosen projects. The Commission shall allocate some or all of the available credit among chosen projects as provided for in 830 CMR 63.38R.1(3)(c).
  2. The Commission shall issue a written notice to applicants for second certification within 45 days of the approval deadlines provided for in 830 CMR 63.38R.1(6). A chosen project shall receive a written notice of acceptance that contains a statement detailing the allocation of credit as determined by the Commission under 830 CMR 63.38R.1(3)(c). An applicant that is not chosen for second certification shall receive a written notice that contains a statement of reason for its not having been selected.
- (c) *Final Certification.* A final certification is issued by the Commission when construction is completed, certifying that the work was completed as proposed and that the costs are consistent with the work completed. Such final certification shall be acceptable as proof that the expenditures related to such construction qualify as qualified rehabilitation expenditures for purposes of the credit allowed under M.G.L. c. 62, § 6J or M.G.L. c. 63, § 38R and this regulation.

### (5) *Chosen Projects; Application of Criteria.*

Within the application schedule provided for in 830 CMR 38R.1(6)(a), the Commission shall assess each initially certified project's contribution to the significance of the area and the relative public benefit of its proposed rehabilitation to the Commonwealth by applying the following criteria:

- (a) *Affordable Housing.* At least 25 per cent of the tax credits shall be allowed for projects that contain affordable housing whenever possible and consistent with the criteria set forth in 830 CMR 63.38R.1(5).
- (b) *Preservation.* The extent to which historic, architectural or cultural preservation is achieved for the features and portions of the structure and its site and environment. In considering the extent of historic preservation, the Commission will review the project's utilization of traditional materials and technology and the retention of historic fabric. The project, when necessary, will be consistent with local and state planning priorities for development or protection. In addition, the Commission will consider the extent to which the project complements other state revitalization efforts. The Commission will give consideration to the level of historic significance as defined by the National Register of Historic Places.

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- (c) *Potential for Loss or Destruction.* Consideration of the potential loss or destruction of the historic structure(s) but for the financial assistance of the credit by evaluating the overall condition of the property including, but not limited to, an assessment of deferred maintenance, water penetration or structural failure.
- (d) *Statement of Need.* Assessment and demonstration of the impact and need for the financial assistance of the credit utilizing an evaluation of the extent of benefit from other funding sources.
- (e) *Geographic Diversity.* The project's potential for enhancing the geographic distribution of tax credit allocations throughout the Commonwealth.
- (f) *Administration and Feasibility of the Project.* The relative soundness and feasibility of the proposal as reflected in a budget that details eligible costs and a proposal consistent with the Secretary of Interior's Standards for the Rehabilitation of Historic Properties. Submission to the Commission of a conditions survey or work progress checklist. Compliance with relevant state laws or any pertinent Executive Orders such as Executive Orders regarding housing, affirmative action or sprawl and growth planning.
- (g) *Public Support.* The extent to which the taxpayer has sought public comments or received public support for the project from public organizations including, but not limited to, the Statewide Preservation Organization, the National Trust for Historic Preservation and any local historical commission.
- (h) *State of Utility.* The extent to which the project will transform a structure or site that currently lacks beneficial or practical use into one that reflects positively on the community and the Commonwealth.
- (i) *Economic Impact.* The project's economic impact on the surrounding community and the Commonwealth as a whole.

The Commission shall determine, utilizing the criteria set forth in 830 CMR 38R.1(5) and within the application schedule provided for in 830 CMR 38R.1(6), which projects, if any, are eligible to receive second certification under 830 CMR 38R.1(4)(b). The Commission's determination is not an adjudicatory proceeding under M.G.L. c. 30A, § 1 and therefore is not subject to review under M.G.L. c. 30A, § 14.

### (6) *Application Process and Administrative Fees.*

- (a) *Application Deadlines.* Applications for initial, second and final certification are to be submitted to the Commission. Applications for initial and final certification are accepted and considered on a rolling basis. Applications for second certification are accepted and considered on a schedule as follows:

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1. applications received by the Commission by April 30 will be considered for approval by May 31;
2. applications received by the Commission by August 31 will be considered for approval by September 30; and
3. applications received by the Commission by December 31 will be considered for approval by January 31.

The Commission is not required to issue second certifications in all application cycles.

- (b) *Application Forms.* Application forms can be obtained from the Commission.
- (c) *Initial Applications.* Applications for certification may be accepted under the application schedule on or after the effective date of this regulation, provided, however, that the Commission shall not issue final certifications before January 1, 2005.
- (d) *Application Fees.* The Commission may impose a fee for any stage of the application and certification process.
- (7) *Transferability of Credit.*
- (a) *Transferors, Transferees.* Any taxpayer, allowed to take the historic rehabilitation credit may transfer the credit, in whole or in part, to any individual or entity, without the requirement of transferring any ownership interest in the project or any interest in the entity which owns the project. Transferees are entitled to apply the credits against the tax or excise with the same effect as if the transferee had incurred the qualified rehabilitation expenditures. For treatment of carryover credit, see 830 CMR 63.38R.1(10). The credit can be transferred only after the date a chosen project becomes a completed project. For recapture treatment, see 830 CMR 63.38R.1(12).
- (b) *Notice and Transfer Statement.* The Commission, in consultation with the Department of Revenue, shall promulgate a form of transfer statement to be filed by the transferor of the rehabilitation credit. The transfer statement shall be required in addition to the transfer contract required in 830 CMR 63.38R.1(7)(c). Transfer Statement forms may be obtained from the Commission. The transferor shall file a transfer statement and a copy of the proposed transfer contract with the Department of Revenue prior to the transfer and shall further file with the Department of Revenue the executed transfer contract within 30 days after the completed transfer. The transfer statement shall provide the name and federal taxpayer identification number of each transferor and transferee. Further, such statement shall indicate the amount of historic rehabilitation credit transferred to

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each transferee. The statement shall also contain such other information as the Department of Revenue or the Commission may from time to time require.

(c) *Transfer Contract Requirements.* Any taxpayer transferring his or her credit must enter into a transfer contract with the transferee. The transfer contract must specify the following:

1. description and address for all structures in the project;
2. the date each structure in the project was placed in service;
3. the schedule of years during which the credit may be taken and the amount of credit previously taken for the project including all previous transferees; and
4. the amount of credit being transferred.

(d) *Transferred Eligibility to Claim Credit.* Any taxpayer who is a transferee of the historic rehabilitation credit may, provided all transfer and other requirements or limitations are met, apply such credit to either the tax imposed under M.G.L. c. 62 or the excise imposed under M.G.L. c. 63.

(8) *Allotment of Credit Among Partners, Members or Owners.*

Historic rehabilitation tax credits allowed to a partnership, a limited liability company taxed as a partnership or multiple owners of property shall be passed through to the persons designated as partners, members or owners, respectively, pro rata or, without regard to their sharing of other tax or economic attributes of such entity, pursuant to an executed agreement among such persons designated as partners, members or owners documenting an alternative distribution method.

(9) *First Tax Year for Claiming Credit.*

A taxpayer may apply the credit against the tax or excise imposed by M.G.L. c. 62 or M.G.L. c. 63, beginning with the tax year a chosen project becomes a completed project.

(10) *Carryforward of Credit.*

(a) *Carryforward Period.* Any taxpayer allowed a credit under M.G.L. c. 62, § 6J or M.G.L. c. 63, § 38R and this regulation for any taxable year may carry over and apply to the tax imposed by M.G.L. c. 62 or the excise imposed by M.G.L. c. 63, in any of the succeeding five taxable years, the portion, as reduced from year to year, of those credits which exceed such tax or excise for the taxable year. The carryover period, for any taxpayer, cannot exceed five taxable years after the close of the taxable year during which the chosen project becomes a completed project as provided for in 830 CMR 63.38R.1(9).

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- (b) *Carryforward of Transferred Credits.* A transferee shall use the credit in the year it is transferred. If the credit allowable for any tax year exceeds the transferee's tax liability for that tax year, the transferee may carry forward and apply in a subsequent taxable year, the portion, as reduced from year to year, of those credits which exceed such tax for the taxable year; provided, however, that the carryover period cannot exceed five taxable years after the close of the taxable year during which the chosen project becomes a completed project as provided for in 830 CMR 63.38R.1(9).

### (11) *Ordering of Credit; Limitations on Credit.*

- (a) *Ordering of Credit.* The credit may be applied in combination with other credits allowed under M.G.L. c. 62 in any order. Similarly, the credit may be applied in combination with other credits allowed under M.G.L. c. 63 in any order.
- (b) *Minimum Excise Limitation.* The credit may not be applied to reduce the minimum excise due under M.G.L. c. 63, §§ 32(b), 39(b).
- (c) *50% Limitation Inapplicable.* In determining the amount of the credit allowable for a taxable year, the 50% limitation imposed by M.G.L. c. 63, § 32C does not apply.
- (d) *Combined Group Members.* A taxpayer that participates in the filing a combined Massachusetts return of income may apply the credit against the portions of the combined group's excise liability attributable to the taxpayer, determined in accordance with the provisions of 830 CMR 63.32B.1(8), and not against the excise liability of other group members.
- (e) *Credit Nonrefundable.* The credit is nonrefundable.

### (12) *Recapture.*

- (a) *Recapture.* If, before the end of the five year period beginning on the date on which the chosen project becomes a completed project, the taxpayer disposes of such taxpayer's interest in the project, the taxpayer's tax for the taxable year in which such disposition occurs shall be increased by the recapture amount. Any carryforward credit shall be adjusted by reason of such disposition.
- (b) *Transferees; Recapture.* Only taxpayers with an ownership interest on the date on which the chosen project becomes a completed project shall be subject to recapture. Transferees are not subject to recapture.
- (c) *Amount of Recapture.* The recapture amount shall equal the amount of the credit taken by the taxpayer, including any transferred credit, minus the credit allowed for ownership, but not less than zero. The credit allowed for ownership shall be the product of the amount of the credit allowed multiplied by a ratio, the



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numerator of which is the number of months the rehabilitated structure is owned by the taxpayer, and the denominator of which is 60. Credit taken includes any credit transferred. The month of disposition is considered a month owned by the taxpayer.

- (d) *Partial Disposition.* In the case of a partial disposition of the taxpayer's ownership interest in the project the recapture amount shall be pro rated.
- (e) *Examples.* The following examples illustrate the application of 830 CMR 63.38R.1(12).

*Example 1.* Calendar year taxpayer is allowed \$100,000 of credit for a completed project as of April 30, 2005. In tax year 2005, taxpayer takes \$40,000 of credit on his return, transfers \$10,000 of credit and carries forward \$50,000 of credit. On April 30, 2006 taxpayer disposes of 100% of his interest in the project. The taxpayer has owned the project for 20% of the required time (12 months divided by 60 months) and is therefore allowed 20% of the \$100,000 credit for ownership, or \$20,000. The taxpayer has taken \$50,000 of credit (\$40,000 on his return plus the \$10,000 transferred credit) and will have a \$30,000 recapture tax in his 2006 tax year. The \$50,000 carryforward is disallowed.

*Example 2.* Same facts as Example 1, except that in tax year 2005 taxpayer takes \$10,000 of credit on his return, transfers \$5,000 of credit and carries forward \$85,000 of credit. The taxpayer has taken \$15,000 of the credit but is allowed \$20,000 of the credit for ownership. There is no recapture tax but the carryforward is reduced to \$5,000.

*Example 3.* Same facts as Example 2, except the taxpayer disposes of 10% of his ownership interest on April 30, 2006. In this case, 10% of the taxpayer's \$100,000 allowed credit is subject to recapture. The taxpayer has owned this portion (\$10,000) of the project for 20% of the required time (12 months divided by 60 months) and is allowed 20% of the \$10,000 credit for ownership, or \$2,000. In addition, the taxpayer still is entitled to 90% of \$100,000 of the allowed credit. Therefore, the taxpayer is allowed \$92,000 of the credit. There is no recapture tax but the carryforward is reduced by \$8,000.

### (13) *Authorization to Take Further Actions.*

Nothing in 830 CMR 63.38R.1 shall be deemed to limit the express or implied authority of the Commission or the Department of Revenue to take all actions deemed by the Commission or the Department of Revenue in their discretion to be consistent with the authority granted under M.G.L. c. 62, § 6J and M.G.L. c. 63, § 38R (St. 2003, c. 141, §§ 22, 24, 82 and St. 2004, c. 65, §§ 5-9, 13-18, 54).

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### **REGULATORY AUTHORITY**

830 CMR 63.38R.1: M.G.L. c. 62, §§ 6J and M.G.L. c. 63, § 38R (St. 2003, c. 141, §§ 22, 24, 82 and St. 2004, c. 65, §§ 5-9, 13-18, 54).

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